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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 516

BILLY GENE COMPTON,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Billy Gene Compton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The United States District Court for the Western District of Tennessee, Western Division, gave no written opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix, pages 19-27, infra; it has not yet been reported.

JURISDICTION.

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 4, 1966 (Appendix pages 19-27, infra). The jurisdiction of the Court is invoked under 28 U. S. Code 1254 (1).

QUESTIONS PRESENTED.

1. Does 18 U. S. C. A. 1952 delegate the legislative authority reserved to Congress by Article 1, Section 1, Constitution of the United States of America, in that Congress has not defined an essential element of the federal crime prohibited by the act, but has left it to state legislatures and federal courts to determine that essential element, "violation of state law"?

2. Does 18 U. S. C. A. 1952 contravene the 5th Amendment to the Constitution of the United States of America by allowing deprivation of liberty and property without due process in that it allows a federal court and jury to determine what is a violation of a state law to be tried in a federal court?

3. Does 18 U. S. C. A. 1952 invade the rights left to the states by the 10th Amendment to the Constitution of the United States of America by allowing a federal court to decide what action are prohibited in the State of Tennessee concerning matters of purely local concern?

4. Does Congress have authority under Article 1, Section 8, Clause 3 of the Constitution of the United States to impose criminal sanctions on one instance of interstate travel not otherwise in itself unlawful, change of domicile from one state to another, if at the time of travel there is an intent to thereafter violate a state law followed by a violation or attempted violation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article 1, Section 1, Constitution of the United States of America. "**Legislative powers vested in congress.**—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives."

Article 1, Section 8, Clause 3, Constitution of the United States of America. "**Powers of congress.**—The congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 5, Constitution of the United States of America. "**Criminal actions—Provisions concerning—Due process of law and just compensation clauses.**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 10, Constitution of the United States of America. "**Rights reserved to states or people.**—The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

18 U. S. C. A. 1952. "**Interstate and foreign travel or transportation in aid of racketeering enterprises.**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

STATEMENT.

On May 13, 1964, a three count indictment was filed in the Western District of Tennessee, pursuant to 18 U. S. C. A. 3231, charging in Count I that "commencing on or about the 12th day of November, 1963, Billy Gene Compton unlawfully, willfully and knowingly did travel in interstate commerce from the State of Arkansas to Tipton County in the Western District of Tennessee, Western Division, with intent to distribute the proceeds of, and to otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity, to-wit, The Valley Club, being a business enterprise involving gambling in violation of Sections 39-2002, 39-2003, 39-2004, 39-2006, 39-2031 and 39-2032 of the Tennessee Code Annotated, the law of the State of Tennessee, and thereafter unlawfully, willfully and knowingly performed or attempted to perform acts to distribute the proceeds of said unlawful activity, promote, manage, establish, carry on and facilitate the promotion, management, estab-

lishment and carrying on of said unlawful activity, in violation of Title 18, U. S. C. A., Section 1952.

nm 10,000., or nm 5 yrs., or both" .(R. 3A-5A).

We are not concerned with the other Counts in the indictment, as the District Court directed a verdict of acquittal on Count III (R. 6A, 128A), and the jury returned a verdict of not guilty on Count II (R. 6A, 229A).

The proof showed that in June, 1963, Billy Gene Compton engaged in professional gambling at Blackfish Lake, Arkansas (R. 38A-50A). In late October or early November of 1963, Billy Gene Compton began trying to sell his house in West Memphis, Arkansas, although it was never sold (R. 21A-23A). On November 18, 1963, Billy Gene Compton rented a home in Memphis, Tennessee, and on November 20, 1963, moved with his family from West Memphis, Arkansas to Memphis, Tennessee (R. 52A-58A). On December 2, 1963, Billy Gene Compton became the owner of a club in Tipton County, Tennessee, and began operating it as a gambling club (R. 111A-116A, 142A).

There was other evidence introduced in an attempt to prove Billy Gene Compton induced David McElduff and Donald Crosby to travel in interstate commerce (R. 103A-105A, 113A-118A), and about Billy Gene Compton renting a truck on November 15, 1963, and helping furniture to be moved into the club in Tipton County, Tennessee, of which he later became owner (R. 135A-136A, 160A), but this evidence was not relevant to the issues now before the Court as defendant was only convicted on the basis of moving with his family to Memphis, Tennessee from West Memphis, Arkansas. As the Court of Appeals observed, "The facts for the purpose of this appeal may be briefly stated. The defendant moved his family from West Memphis, Arkansas to Shelby County, Tennessee, on or about November 20, 1963. A few days later he took over

the operation of a gambling club, which he called the Valley Club, in Tipton County, Tennessee. The principal issue at the trial was whether the defendant, in moving or traveling to Tennessee, had the intent to engage in a gambling business in violation of the laws of Tennessee'' (Appendix, infra, page 20).

Billy Gene Compton was found guilty under Count I of violating 28 U. S. C. A. 1952, and sentenced to five years imprisonment and payment of a $5,000 fine (R. 7A, 229A, 230A).

Billy Gene Compton appealed to the United States Court of Appeals for the Sixth Circuit from the judgment filed on November 4, 1964 (R. 10A).

On August 4, 1966, the United States Court of Appeals for the Sixth Circuit reversed the conviction and remanded the case for a new trial, but refused to hold 28 U. S. C. A. 1952 unconstitutional either on its face or in its application to the facts of this case. (Appendix, infra, page 21).

REASONS FOR GRANTING THE WRIT.

I.

The opinion rendered by the United States Court of Appeals for the Sixth Circuit is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit on the same matter.

This case is in conflict with the opinion filed on February 3, 1966, by the United States Court of Appeals for the Fourth Circuit in United States of America v. James Russell Hawthorne, reported in 356 F. (2d) 740.

There, the defendant, Hawthorne, traveled from Indiana to West Virginia on several occasions to make arrangements for operating a gambling business in West Virginia.

On October 11, 1962, defendant traveled with his family from Indiana to West Virginia; ". . . the immediate purpose of this trip was to move Hawthorne's family from Indiana to the new home."

The Court stated:

> "The statute was intended to make interstate travel or transportation in aid of racketeering enterprises a crime.
>
> It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act. See Twining v. New Jersey, 211 U. S. 78, 97 (1908); Kent v. Dulles, 357 U. S. 116 (1958); Zemel v. Rusk, 381 U. S. 1 (1965). The government cites no case which supports its position."

In the present case, defendant, Compton, traveled from West Memphis, Arkansas, to Memphis, Tennessee, in November, 1963, for the purpose of moving his family to their new home. The defendant maintained that the Act did not apply to this activity or that, it was unconstitutional if it did. The United States Court of Appeals for the Sixth Circuit summarily disposed of this question as follows:

> "We find no merit to the constitutional questions." (Appendix, infra, page 21.)

In the Fourth Circuit case, Hawthorne moved his family hundreds of miles from Indiana to West Virginia, which was necessary for him to operate his gambling business in West Virginia as it would have been difficult, if not impossible, for him to do so from Indiana. By way of contrast, it was not at all necessary for Billy Gene Compton to move from West Memphis to Memphis, to operate a gambling business in Tennessee, as West Memphis is directly across the Mississippi River from

Memphis, and there would be little, if any, difference in convenience of operation of his gambling club in Tennessee, whether he lived in West Memphis or Memphis.

Nevertheless, the Fourth Circuit in the Hawthorne case recognized that there must be a direct relation between the travel and the illegal activity, that it is not a crime per se for a gambler to travel interstate, and that to so hold would raise serious questions as to the constitutionality of the Act.

We, therefore, have the Fourth Circuit saying that the Act does not apply to this situation and at least implying it would be unconstitutional if it did, while the Sixth Circuit says it does apply and is not unconstitutional to be so applied.

While the decisions of these two Circuits are not as directly in conflict as to the constitutionality of the Act, as they are on the application of the Act, there is no question but that there is a very real and direct conflict as to the applicability of the Act to almost identical factual situations, and a very strong indication of a conflict as to the constitutionality of the Act if interpreted, as the government contends for in the instant case. We, therefore, respectfully submit that this conflict is of considerable public importance and that the writ of certiorari should issue under Rule 19 of this Court to resolve this conflict.

II.

The U. S. Court of Appeals for the Sixth Circuit has decided important questions of federal law, which have not been, but should be, settled by this Court.

18 U. S. C. A. 1952 raises several constitutional questions as applied to Billy Gene Compton. The act prohibits interstate travel with intent to thereafter engage in acts

in violation of state law and thereafter to engage in such acts. The act does not incorporate the state laws that it refers to violating and does not, itself, define the prohibited acts.

We are concerned with the 5th Amendment in that the federal jury must in effect convict the defendant of a state crime to determine there has been a "violation of state law", which denies due process of a state trial, to determine whether a state offense has been committed.

We are concerned with the 10th Amendment in that a federal jury is permitted and even required to determine violation of state law which is a right reserved to the states.

We are concerned with Article 1, Section 1, in that Congress has delegated the legislative function of defining criminal activity to state legislatures and federal courts.

And, we are concerned with Article 1, Section 8, Clause 3, in that the act exceeds the power of Congress to regulate interstate commerce and amounts to a denial of due process, if it prohibits interstate travel, which does not, itself, promote an illegal activity.

This Court has heretofore upheld incorporation of a state law into a federal statute, where the same acts prohibited by state law are defined, by the incorporation, as being federal criminal offenses in United States v. Sharpnock, 355 U. S. 286, with Mr. Justice Douglas and Mr. Justice Black dissenting (page 297) on the basis that to allow incorporation of state laws inacted after passage of the Federal Assimilative Crimes Act, was an improper delegation to the states of the authority granted to Congress under Article 1, Section 1, of the Constitution.

This Court has also upheld the constitutionality of the Mann Act, 18 U. S. C. A. 2421 et seq., and the Dyer Act,

18 U. S. C. A. 2311 et seq., Camminetti v. United States, 242 U. S. 470, Brooks v. United States, 267 U. S. 432.

The Mann Act, supra, and the Dyer Act, supra, do not leave it to the state legislatures or courts to say what is a stolen automobile or what is prostitution; the acts themselves define the terms. The Federal Assimilative Crimes Act, supra, incorporates and adopts the state law as its definition of a federal crime. The exact language is that "whoever . . . is guilty of any act or omission which . . . would be punishable if committed or omitted within the jurisdiction of the State . . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, **shall be guilty of a like offense** and subject to a like punishment." 18 U. S. C. A. 13.

These acts all provide for punishment of certain acts **as federal crimes**; acts which are either defined in the federal act or defined by specifically incorporating state law, but 18 U. S. C. A. 1952 does not define the acts or incorporate state law in regard to an essential element of the federal crime (the thereafter act), defined therein. It does not incorporate state gambling laws by reference, but, instead, provides that "whoever travels in interstate . . . commerce . . . with intent to . . . otherwise promote, manage, establish . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts . . . shall be fined . . . or imprisoned . . .

(b) ". . . 'unlawful activity' means any business enterprise involving gambling . . . **in violation of the laws of the state** in which they are committed . . ."

Therefore, this act is essentially different from the Federal Assimilative Crimes Act and similar acts in that acts prohibited by the states are not incorporated into the federal law and the commission of the act made a federal crime, but, instead, a **violation of state law** is made an essential element of a federal crime.

Violation of state law incompasses more than just the statutory and case law of a state. Before it can be said that there has been a violation of state law, there must first be common law or statutory prohibition of certain acts, an arrest according to state and federal constitutional and statutory requirements, an indictment according to federal constitutional and state requirements, a trial in a Court of competent jurisdiction, with proper state and federal constitutional, common law and statutory safeguards and a verdict of guilty. Only then, can it be said that there has been a violation of state law.

To allow a federal jury to convict the defendant of violating state law, which they must in effect do before they can say there has been a violation of state law, is a denial of due process under the Fifth Amendment to the Constitution of the United States.

There are numerous distinctions between the practice of the federal courts and the courts of Tennessee in criminal cases. (Federal juries may have exhibits in the jury room, Tennessee juries may not. The Tennessee Supreme Court will reweigh the evidence, Federal Appellate Courts will not.)

This is also an invasion of the rights reserved to the states by Amendment X to the Constitution of the United States in that it permits and requires federal juries to determine what conduct is prohibited in a statute without following the state machinery set up for this purpose. Amendment X reserves to the states this right, and we are not here concerned with the exercise of police powers by the federal government, which are merely incidental to a valid federal purpose.

The situation here is different from that in McCoy v. Pescor, 145 F. (2d) 260, and in similar cases where the only determination being made was whether a federal crime, defined by incorporation of state law by reference,

had occurred, and there was not any need to try and determine whether the defendant violated a state law. Here, it is necessary to find a "violation of state law" as an essential element of the "crime" defined in 18 U. S. C. A. 1952. By having this an element of the crime, federal juries are permitted and required to try defendants and determine that they have violated the state law.

Petitioner earnestly submits that the only way the "violation of state law" requirement in the act could be satisfied without infringement on the constitutional guarantees of Amendments V and X, is for the petitioner to have been properly arrested, indicted, tried and convicted in a state court of competent jurisdiction, and evidence of this conviction introduced in his trial for violation of 18 U. S. C. A. 1952.

Had Congress incorporated state law by reference rather than referring to "violation of state law", this pitfall might have been avoided, but this it did not do.

Therefore, we have an act that contravenes Amendments V and X by allowing federal juries to determine a violation of state law. Also, by reason of the failure of Congress to either define the prohibited acts in the Act itself, or by incorporation of state law, this is an improper delegation of authority, and is a much clearer illustration of the evil discussed by Mr. Justice Douglas in United States v. Sharpnock, supra, and by the Court in Schechter Corporation v. United States, 295 U. S. 495, and Youngstown Sheet and Tube Company v. Sawyer, 343 U. S. 579, of delegation of the power granted to Congress under Article 1, of the Constitution of the United States. The authority is not just delegated to state legislatures, but is delegated and diffused down to individual federal juries, who determine there has been a "violation of state law". Even if there had been a state trial where defendant had been convicted, which is the only constitutional

manner of determining there has been a "violation of state law", we would still have congressional authority delegated and diffused to the level of individual state juries.

Even if 18 U. S. C. 1952 did incorporate state law by reference so that it did not contravene Article 1, Section 1, and Amendments V and X; still it would violate Article 1, Section 8, Clause 3, of the Constitution of the United States; if not on its face, then in its application to the petitioner in this case.

Did Congress intend to cover the conduct of appellant in this case? The legislative history does not indicate it did; strict construction required of a criminal statute would not indicate it did and the requirement to construe an act to be constitutional, if possible, would lead to the construction that it does not.

While Congress's power under the commerce clause is broad, still the action sought to be regulated must bear some relationship to interstate commerce.

The Mann Acts and Dyer Act aim at the use of interstate travel in the promotion of crime in that interstate travel aids the criminal in avoiding local prosecution and hinders state officials in their crime fighting efforts. This is clearly a proper domain of Congress under the commerce clause and appears to be the aim of Congress in passing the subject Act. The sub-title "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises" and the hearings before the Congressional committee would seem to indicate that Congress had that intention and did not intend to cover the situation here present.

(U. S. Code Congressional and Administrative News, Volume 2, 87th Cong. First session, 1961, pages 2664 through 2666.)

Purpose of the Bill.

"The purpose of the bill, as amended, is to amend Chapter 95, Title 18, United States Code, by adding a new section designated 1952, to prohibit travel in interstate commerce or the use of the facilities of interstate or foreign commerce, including the mail, **in the aid of racketeering enterprises** . . .

Statement.

". . . The bill is a part of the Attorney General's crime program to combat **organized crime and racketeering.**

"The Attorney General testified before the committee on May 17, 1961 in support of the bill. In his testimony he cited numerous instances of the use of the facilities of interstate commerce by racketeers and hoodlums to **promote** the illegal enterprises, to distribute the proceeds among the syndicate members of illegal gambling, liquor, narcotics and prostitution businesses and the use of the facilities for the commission of crimes of violence in furtherance of the unlawful activities.

"He spoke of racketeers living in one State and controlling the rackets and reaping the profits from those rackets located in another state. The racketeer would be beyond the control of the police in the state of operation and living as a respected citizen in the State of his abode.

"The interstate tentacles of this octopus known as 'organized crime' or 'the syndicate' can only be cut by making it a Federal offense to use the facilities of interstate commerce **in the carrying on** of these nefarious activities.

"The bill will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor, narcotics or prostitution business enterprises. Testimony produced at the hearings clearly dem-

onstrated the interstate network of criminals engaged in such unlawful activities. It further demonstrated the need for the assistance of the Federal Government in view of the fact that law enforcement authorities are limited and hindered by the interstate nature of these activities . . .'' (Emphasis added.)

Office of the Attorney General,
Washington, D. C., April 6, 1961.

''The Speaker
House of Representatives
Washington, D. C.

''Dear Mr. Speaker: Enclosed for your consideration and appropriate reference is draft legislation to amend Title 18, United States Code, to prohibit travel in aid of racketeering enterprises.

''Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

''The bill which I submit to the Congress would impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities.' These are defined in the bill as business enterprises involving gambling, liquor, narcotics, or prostitution activities which are offenses under Federal law or the law of the State where they are committed, and extortion and bribery. The bill would also have the effect, through its interaction with Section 2 of Title 18, United States Code, of prescribing penalties for persons who send others on similar missions. Such violations would be punishable by a fine as high as $10,000 or a prison term of up to 5 years, or both.

"The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far-flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combating pernicious undertakings which cross State lines.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

'Sincerely,

'Robert F. Kennedy,
Attorney General."

All of this would indicate that Congress was attempting to stop organized interstate crime where the activity in interstate commerce aids the criminal activity and local law enforcement is unable to cope with it.

Does the Act cover the situation where the interstate activity does not itself directly further criminal activity? As for example, in our case, appellant brings his family into Tennessee, intending thereafter to start up an unlawful activity. The government says 'yes' and that the later violation or attempted violation of state law is a valid basis for regulation of interstate commerce. This is the basic flaw in this Act if the government is correct. It is clear that the only thing that differentiates lawful or unlawful activity under the government's theory is a purely local Act which has not even an indirect bearing on interstate commerce, but which, of necessity, must occur after all interstate activity ceases. It is important to keep in mind that merely traveling with the intent is not a crime under the Act.

It is also important to note that there is no time specified in the Act as to how soon after the interstate travel the act to violate state law must occur. If the government

is correct, a citizen could cross a state line intending to violate a state law, could then live in that state for 10, 20 or 30 years, could travel intrastate and to many other states and return and if he thereafter carried out his original intention, he would be guilty of a violation.

If the Act read merely 'traveling with intent', it would be different, but here an essential element of the offense is the violation or attempted violation of state law unconnected in any way to the travel.

The rules of construction of criminal statutes, the title of the act, the legislative history all indicate the act does not cover appellant's situation. Also, if possible, laws should be construed so as to be constitutional and to apply this law to appellant as the government seeks would be unconstitutional.

It is obvious that if so construed, the Act would be unconstitutional on its face as an essential element of the federal offense, violation or attempted violation of a state law, has no relationship to interstate commerce and would be an attempt by Congress to exercise authority it does not have.

Carter v. Carter Coal Co., 298 U. S. 238;
N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1;
Schechter Poultry Corp. v. United States, 295 U. S. 495.

Many other countries restrict and limit travel of its citizens in their own country, but we have always recognized that our citizens are free to move from one community to another without governmental regulation. If this act stands, as interpreted by the government and the Court of Appeals for the Sixth Circuit, anyone who wishes to move from one state to another who has ever engaged in gambling, will fear to do so.

He may have a new job or other incentive to move, beneficial to himself, his family and society, but will be unable to risk moving because he knows if he gambles, even 10 or 20 years later, he can be prosecuted under the government's interpretation of this Act. He will become a virtual prisoner in the state in which he now lives. To stop interstate travel, not in itself in furtherance of an unlawful activity, so as to imprison a man in one state, is a denial of all due process and beyond the authority of Congress under any provision of the Constitution.

CONCLUSION.

For the reasons stated, the petition for certiorari should be granted in order to permit this Court to resolve a conflict between two circuits and to resolve an important question of Federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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